UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.520
21 June 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 520th MEETING

Held at Headquarters, New York,
on Tuesday, 31 May 1994, at 10.30 a.m.

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| Temporary Chairman: | Mr. CORELL | (Under-Secretary-General, The Legal Counsel) |
| later: | Mr. HERRMANN | (Secretary of the Commission) |
| Chairman: | Mr. MORAN | (Spain) |

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.45 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN said that current international developments made the unification and harmonization of international trade law increasingly important. There was therefore a crucial need for a modern legal order governing cross-border commerce, and the United Nations Commission on International Trade Law (UNCITRAL) had made a valuable contribution in that area. The consensus in the international community that economic development required the existence of a legal order to enhance the rule of law also rendered the Commission's work more valuable, since, from a developmental perspective, the rule of law was no longer limited to constitutional and judicial issues, but extended to the establishment of a proper legal infrastructure which promoted trade and investment and facilitated the fair and speedy settlement of disputes.

2. The Commission had decided the previous year that the major item for consideration at the current session would be the draft model provisions on procurement of services, which would provide States with a comprehensive model law that would cover all types of procurement. The Commission's work on procurement was already eliciting interest in a number of countries, especially in newly independent States and States whose economies were in transition and where legislation on procurement often did not exist. Several States were already enacting procurement legislation based on the UNCITRAL Model Law on Procurement of Goods and Construction. Since procurement of services was a relatively new area in which many States did not have a developed practice, it was of particular importance that the model provisions should be practicable.

3. The Commission had also made a valuable contribution in the area of international arbitration. The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Model Arbitration Law (1985), for example, had become the universal standards against which arbitration rules and national laws on international arbitration were assessed and modelled. The current draft guidelines for preparatory conferences in arbitral proceedings, which were intended to foster efficiency and predictability in international arbitrations, were an appropriate complement to existing UNCITRAL legal texts.

4. The proposed discussion of the implications of the entry into force of the Hamburg Rules (1978) was both timely and useful, since the current situation of the law of the carriage of goods by sea was unsatisfactory. He hoped that the Commission's deliberations would lead to an accelerated transition from the legal regime based on The Hague Rules to the modern regime of the Hamburg Rules. Other important topics for possible future work, namely cross-border insolvency and receivables financing, would also be discussed at the current session.

5. The promotion of the Commission as an institution and of its legal texts had become a regular part of the Secretariat's work. As a result of such activities and the political and economic changes that were taking place in many countries, there had been a considerable increase in requests for technical

(The Temporary Chairman)

assistance and for regional and national seminars. While efforts to meet those requests placed an additional strain on the Secretariat's human and financial resources, the Commission would undoubtedly adopt additional texts in the foreseeable future. Despite frequent appeals from the Commission and the General Assembly, contributions to the UNCITRAL Trust Fund for Symposia had been declining. Commission members should therefore urge their respective Governments to increase their contributions to the Fund or to second a lawyer for a year or so to the International Trade Law Branch of the Office of Legal Affairs.

6. Lastly, he paid a tribute to the memory of Professor Willem Vis, former Secretary of the Commission, who had passed away since the previous session.

The meeting was suspended at 11 a.m. and resumed at 11.35 a.m.

Mr. Herrmann (Secretary of the Commission) took the Chair.

ELECTION OF OFFICERS

7. Mr. JAMES (United Kingdom), seconded by Mr. GUENTCHEV (Bulgaria), said that he wished to nominate Mr. Moran (Spain) as Chairman of the twenty-seventh session on the understanding that the Chairman of the twenty-eighth session would be from the Eastern European group of States.

8. Mr. Moran (Spain) was elected Chairman by acclamation.

9. Mr. Moran (Spain) took the Chair.

ADOPTION OF THE AGENDA

10. Mr. MELAIN (France) said it was unfortunate that the Secretariat had failed to make available on time the French text of the report of the Working Group on the New International Economic Order on the work of its seventeenth session (A/CN.9/392). As a result, French-speaking delegations had not had time to consult their Governments on the report.

11. Mr. LEVY (Canada) said that the Secretariat was to be congratulated for its excellent work in faithfully reflecting the decisions reached by the Working Group after two sessions. He therefore hoped that the debate from those sessions would not be reopened, as such a procedure would delay the work of the current session.

12. After a procedural discussion in which Mr. CHOUKRI SBAI (Morocco), Mr. JAMES (United Kingdom), Mr. LOBSIGER (Observer for Switzerland) and Mr. BAVYKIN (Russian Federation) took part, Mr. HERRMANN (Secretary of the Commission), said that the Office of Conference Services in general and the French Translation Service in particular were understaffed and overworked, and that tight schedules did not improve matters. In the future, the Commission would reduce the workload it required of conference services. Turning to the scheduling of meetings, he said that the discussions on the complex subject of

(Mr. Herrmann)

procurement should be completed before the Commission took up the issue of arbitration.

13. The agenda was adopted.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT

UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION AND GUIDE TO ENACTMENT OF THAT LAW (A/CN.9/393)

PROCUREMENT OF SERVICES (A/CN.9/389, A/CN.9/392 and A/CN.9/394)

14. Mr. HUNJA (International Trade Law Branch), introducing the item, said that the Working Group on the New International Economic Order had devoted its sixteenth and seventeenth sessions to the issue of procurement. At its sixteenth session, the report of which was contained in document A/CN.9/389, the Working Group had decided that a special procedure for procurement of services, entitled "Request for proposals for services" and contained in article 39 bis, would be required to expand the scope of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services to include procurement of services. The Working Group had taken two decisions at its seventeenth session which were reflected in the report of that session (A/CN.9/392) and the annex thereto, entitled "Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services" and which would form the basis of discussions at the Commission's current session.

15. The first decision had been to include the model provisions on procurement of services in a separate chapter dealing with procurement of services, chapter IV bis, entitled "Request for proposals for services". That chapter provided three methods for selecting the successful proposal. The second major decision was that, in addition to requests for proposals for services, all the other methods that were available for procurement of goods and construction services would also be available for procurement of services. There had also been some discussion aimed at simplifying the structure of the Model Law in order to make it easier for States that were considering adopting legislation based on it to do so. The Working Group had also recommended the draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/394) for adoption simultaneously with the amended draft Model Law.

16. Mr. WALLACE (United States of America) said that the drafting of the individual provisions was largely satisfactory and reflected the progress made. The two remaining issues concerned chapter IV bis, in connection with which the Commission should proceed as it had in the past, and the structure of the Model Law and the multiplicity of methods provided for, which gave rise to some concern. It might be preferable for the Commission to delegate responsibility for those issues to a Working Group, which could then present conclusions to the Commission itself.

17. Mr. LEVY (Canada) said that the multiplicity of methods should not present any particular problem, since States were free to make use of the methods they wished. The Commission could note that agreement to include all existing methods had been reached after difficult negotiations, but it would not be wise to reopen the question. The suggestion to refer the matter to a working group was not all that helpful, since the decision ultimately lay with the Commission itself. Much work had been expended in devising the structure before the Commission, and delegations should focus on the substantive work before the Commission rather than becoming embroiled in tangential issues.

18. Mr. JAMES (United Kingdom) agreed with the representative of Canada: the proposals before the Commission had emerged after much discussion, and the important point was for the Commission to reach the crucial article 16 as quickly as possible. In any event there would scarcely be time to schedule meetings of a working group.

19. Mr. MELAIN (France) endorsed the views of the previous two speakers. The availability of all methods had been agreed by consensus and the question should not be reopened. He agreed that it was important for the Commission in its entirety to deal with article 16 at an early stage.

20. Mr. CHATURVEDI (India) asked whether the decision to include services in the Model Law had been taken by the Commission or by the Working Group.

21. Mr. GOH PHAI (Singapore) supported the views expressed by the United Kingdom and agreed that the Commission should proceed with its substantive work as quickly as possible.

22. Mr. HUNJA (International Trade Law Branch) said that the question of the addition of services to the Model Law had been dealt with by the Commission at its twenty-sixth session and was reflected in paragraph 262 of its report to the General Assembly (A/48/17). The Commission should note that the Model Law on Procurement of Goods and Construction, already adopted by the General Assembly, would still be available to those States that were not interested in services.

23. Mr. CHATURVEDI (India) said that his delegation reserved its position on the draft Model Law.

24. The CHAIRMAN invited the Commission to consider the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, contained in the annex to document A/CN.9/392.

Preamble

25. The preamble was approved.

Article 1

26. Article 1 was approved.

Article 2 (a)

27. Article 2 (a) was approved.

Article 2 (b)

28. Article 2 (b) was approved.

The meeting rose at 1 p.m.

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Distr.
GENERAL

A/CN.9/SR.521
22 July 1994
ENGLISH
ORIGINAL: SPANISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 521st MEETING

Held at Headquarters, New York,
on Tuesday, 31 May 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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New international economic order: procurement (continued)

(b) Procurement of services (continued)

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The meeting was called to order at 3.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

(b) PROCUREMENT OF SERVICES (continued) (A/CN.9/392)

Article 2, subparagraph (c) (continued)

1. Mr. TUVAYANOND (Thailand), with reference to the definition of "goods", requested clarification as to whether the services rendered in supplying the goods should be understood as including their transport. If so, he thought there might be some overlap, since procurement of services would be analogous to the procurement of transport, which was a service.

2. The CHAIRMAN said it seemed clear, in the Spanish version at least, that the services entailed in supplying the goods were incidental in nature. The draft defined goods as objects of every kind and description together with the services incidental to the supply of the goods, provided the value of those services did not exceed the value of the goods themselves.

3. Mr. TUVAYANOND (Thailand) referred to a hypothetical case in which the procuring entity wished to purchase a given quantity of goods and transport was not included in the price, so that the procuring entity was obliged to arrange for transport; under those circumstances, he wished to know whether that would be considered goods or services.

4. The CHAIRMAN said that as he understood it, the procuring entity, when soliciting tenders for the supply of goods, would make it clear in the solicitation documents that transport should be included in the final price of the goods. Even if no mention of transport was made when tenders for the supply of goods were solicited, it would be self-evident that the procuring entity in all likelihood expected the goods to be delivered to their destination, and hence the question of awarding a contract for services would not arise there; it would be obvious that the procuring entity wanted the goods to be delivered to their destination, and the supplier would have to resolve the problem as it saw fit.

5. Mr. HUNJA (International Trade Law Branch) suggested a way for the procuring entity to approach the problem. He pointed out that if the contract for procurement of goods did not include transport, the reason might be that the procuring entity had its own means of transport. If that were not the case, and a separate contract had to be concluded for transport, the transport services would be governed by the provisions of the Model Law that referred to procurement of services. It would all depend on the way the contract was structured.

6. The CHAIRMAN said that if there were no objections, he would take it that the Commission wished to adopt subparagraph (c) of article 2.

7. It was so decided.

Article 2, subparagraphs (d) and (d bis)

8. Mr. LEVY (Canada) recalled that the reason for including the language in parentheses at the end of subparagraph (d bis) was that there was a possibility of confusion concerning some objects of procurement, such as intellectual property, which might be considered goods under some legal systems and services under others. Therefore, the Drafting Group had stipulated that the enacting State could specify certain categories of services. Although he did not wish to suggest that changes should be made in the present text, he thought that it would be helpful for the Guide to Enactment to contain a brief explanation of the reasons for inserting the text in parentheses; otherwise, under some legal systems it might be assumed that all such items should be included under services. It should be stated in the Guide that the intention was to cover certain unusual situations in order to avoid erroneous interpretations.

9. Mr. UEMURA (Japan), referring to article 2, subparagraph (d), said that procurement of construction should be handled in the same way as procurement of services. At the previous session of UNCITRAL, it had been noted with reference to procurement of services that the quality of the services depended to a great extent on the knowledge and skills of the suppliers. That suggestion had led UNCITRAL to begin drafting new provisions on procurement of services. In his view, the situation was similar with regard to procurement of construction, since construction normally combined a number of different types of services, and it was hard for the procuring entity to supervise and monitor the quality of the services being rendered during construction. Since, by the time a defect was revealed in the finished work, it was already too late to deal with it effectively, it was important to take into account the technical competence of contractors during the procurement of construction. Therefore, it would be more appropriate to equate procurement of construction with procurement of services, rather than with procurement of goods. Furthermore, construction was treated as a type of service in the GATT Agreement on Government Procurement. Therefore, he suggested that the term "construction" should be dropped from the Model Law and that the Guide should explain that construction work was considered to be included under services.

10. Mr. CHATURVEDI (India) said that while his delegation did not object to UNCITRAL dealing with the question of services, it disagreed with the manner in which that had been done in the annex to document A/CN.9/392. In dealing with the question of services, the Commission should not amend its Model Law on Procurement of Goods and Construction, which, from the point of view of developing countries, was extremely useful. To incorporate the concept of services into various articles of the draft Model Law was to amend the Model Law adopted in 1993. It was his delegation's view that the appropriate way to deal with the matter would be to incorporate autonomous clauses concerning services in a protocol to the 1993 Model Law or in a completely separate document.

11. As for subparagraph (c) of article 2, where the concept of "goods" was defined, he pointed out that goods were tangible and material, whereas services were not. It was therefore incorrect to state that goods included services; the two definitions must be separate. He could offer no solution to that problem, but he felt that it should be kept in mind when the text was being finalized.

12. Mr. TUVAYANOND (Thailand) stated that his delegation had initially had misgivings about the inclusion of services in the definition of "goods"; but after hearing the explanation offered by the Secretary of the Commission, it found the present text acceptable, since much would depend on the wording of the contract. If the price of the goods included transport, that should be included in the definition of goods.

13. As for the definition of construction, he agreed with the point made by the Japanese delegation. Construction fell into the category of services rather than goods and should not be subject to the same regulations as those governing the procurement of goods. In Thai law, construction was considered to be a service; it would therefore be easier for his country to accept parallel regulations for construction and for services. It would be more logical to delete the word "construction", assuming that construction was included in the definition of services.

14. Mr. HERRMANN (Secretary of the Commission) noted in clarification that although he did not wish to involve himself in the discussion, he must remind delegations that they could not simply suggest deletion of the word "construction", since UNCITRAL itself had adopted a Model Law on Procurement of Goods and Construction in 1993. In attempting to determine the appropriate regime for services, one might examine other types of procurement to decide which one most closely resembled services, but the task of UNCITRAL in 1994 should be to add appropriate provisions on services without raising the possibility of eliminating the concept of "construction", which it was technically unable to do.

15. Mr. WALLACE (United States of America) reiterated the Secretary's statement. It was his understanding that UNCITRAL was obliged to follow certain procedural norms, as a result of which a law, once approved, could not be modified by it unless absolutely necessary. That did not mean, however, that the remarks of the Thai delegation regarding terminology should be ignored.

16. As a second point, with regard to the statement made by the delegation of India, in the Working Group it had also been understood that the Group's mandate did not permit it to make unjustified changes. The few references to services in the present draft were the minimum necessary to complete the task assigned to the Group by UNCITRAL in 1993, that of establishing special regulations for procurement of services. Short of adopting an independent law which would include all the general provisions of chapter I, and there was no clear majority in favour of doing so, the only way of dealing with the problem had been to include references to services in several articles of the Model Law.

17. As for the definition of "goods", in his opinion that definition resembled the one established under existing law, although he did not understand why such extensive underlining was necessary. The definition of goods resembled that used in the Convention on the Law Applicable to International Sales of Goods, which had served as a basis for the Model Law.

18. Finally, as other delegations had pointed out, to refer to goods and services in the same definition was probably to mix two quite different things. But that was probably inevitable, and his delegation would not wish to introduce unnecessary modifications to the existing definition.

(Mr. Wallace, United States)

19. Moreover, he doubted that it would be useful to specify that the price of incidental services must be included in documents soliciting tenders. In his opinion, the Commission intended that procurement of those services should be done separately and should therefore be governed by chapter IV bis.

20. The same was true in the case of procurement of construction; if it was specified from the beginning that incidental services would have to be provided in the course of construction, those services would be governed by the regulations applicable to construction; if, on the other hand, incidental services were procured separately, they should be governed by the regulations applicable to services.

21. Mr. HUNJA (International Trade Law Branch) announced that the Model Law, which was included as an annex to the report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, had now been issued as a separate document.

22. Mr. JAMES (United Kingdom), supported by the representative of Australia, said that the delegation of Canada was correct in stating that the commentary would need to clarify the meaning of subparagraph (d bis). The United Kingdom wished to stress the importance of that commentary, especially in regard to services.

23. Mr. HERRMANN (Secretary of the Commission) said that the delegation of Canada had informed him that the text of paragraph 12 of document A/CN.9/394, in which reference was made to the words in parentheses in subparagraphs (c) and (d bis) of document A/CN.9/392, resolved to that delegation's satisfaction the question which it had previously raised. Nevertheless, if any delegation found the wording of paragraph 12 unsatisfactory, it should say so without delay.

24. Mr. CHATURVEDI (India) said that subparagraphs (b), (d) and (d bis) had the same purpose: they all concerned the question of services. Services were defined in subparagraphs (c) and (d). At the same time, in subparagraph (d bis), the word "services" was said to mean "any object of procurement other than goods or construction". If services were defined in one paragraph, it was unnecessary to repeat the definition elsewhere. He therefore wondered whether subparagraph (d) was really necessary. In any case, he felt that the definition of services should be limited to one paragraph.

25. Mr. JAMES (United Kingdom) said that the wording of paragraph 12 of document A/CN.9/394 was somewhat elliptical, and that it might be appropriate to add a sentence to clarify the meaning.

26. Mr. HERMANN (Secretary of the Commission) said that the Secretariat shared the wish of the delegation of India to simplify and shorten the provisions of the draft before the Commission. The Working Group had considered at some length the wording of subparagraphs (c), (d) and (d bis), but had not been able to devise a more appropriate formulation. Those paragraphs were not intended simply to define services, but also to specify the treatment appropriate to the kind of service. There were, in fact, three categories of services: services

(Mr. Hermann)

incidental to the supply of goods, services incidental to construction, and services in general. The current formulation of the paragraphs reflected that fact.

27. Mr. TUVAYANOND (Thailand) asked whether the words in parentheses in paragraph d bis were really necessary. If those words were interpreted in a strict sense they could serve as an escape clause, which a State could make use of to specify improperly that such services were not within the scope of the Model Law, particularly if account were taken of the open-ended nature of the definition of services in paragraph 12 of document A/CN.9/394. He wondered whether it would not be preferable to delete the words in parenthesis, since, if they were retained, the Model Law would authorize States to use the provision to achieve a result other than that implied by the definition in the draft Model Law itself.

28. Mr. HUNJA (International Trade Law Branch) said that it might be necessary to clarify the scope of the words in parentheses in paragraph (d bis), both in that paragraph and in the Guide (A/CN.9/393). The aim was to give States an opportunity to specify in which cases the object of procurement should not be included in the category of goods and construction, particularly where the wording of paragraph (d bis) was not sufficiently specific, as well as in borderline cases. Nevertheless, such wording should not be used for exclusionary purposes that did not accord with the Model Law. Perhaps the Drafting Group should review the current formulation to make sure it expressed what was intended.

29. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve the current formulation of articles 2 (d) and (d bis).

30. It was so decided.

Articles 2 (e) to (h) and article 3

31. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve articles 2 (e) to (h) and article 3.

32. It was so decided.

Article 4

33. Mr. CHATURVEDI (India) said that he was aware that draft article 4 appeared in the Model Law already adopted by the General Assembly, but he wondered whether it was appropriate to authorize States to enact regulations of the kind referred to in the article.

34. The CHAIRMAN noted that article 4 confined itself to drawing to the attention of national legislators certain points which should probably be included in the regulations needed to give effect to the Model Law. Further, the wording appeared in the UNCITRAL Model Law on Procurement of Goods and Construction, adopted by the General Assembly on the recommendation of the Commission, and it would be unfortunate to now recommend something else.

35. Mr. WALLACE (United States of America) said that he fully shared the view of the Chairman, although he understood the concern of the representative of India. He thus suggested that the commentary on article 4 should include some examples of the regulations mentioned in the text, in which connection his delegation intended to make specific proposals.

Article 5

36. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve article 5.

37. It was so decided.

Article 6

38. Mr. KLEIN (Inter-American Development Bank) said that paragraph 6 (c) was imprecise and did not clearly express the intended aim, which was to avoid the disqualification of contractors on the ground of minor technical errors or omissions, as frequently occurred. As currently worded, the paragraph did not clearly explain which errors or omissions would permit disqualification and which would not. The paragraph should thus be reworded accordingly.

39. The CHAIRMAN recalled that the paragraph in question, which had already been approved by the Drafting Group, had been considered in great detail in Vienna, and that the Commission must thus act with caution in considering the possibility of making changes. In any event the Spanish text drew a clear distinction between the substantive and incidental aspects.

40. Mr. WALLACE (United States of America) said that he agreed with the Chairman. He recalled that the matter had been debated at length in Vienna, the point being to make articles 6 and 7 consistent. In his view it was not simply possible to introduce further changes.

41. Mr. TUVAYANOND (Thailand) asked whether, in the interest of greater coherence and to expedite the Commission's work, it would not be appropriate to proceed on the basis that, apart from cases where the nature of the procurement of services justified the adoption of completely different rules, a text should be adopted which was a simple copy of the first Model Law.

42. Mr. HERMANN (Secretary of the Commission) said that the Commission was in fact proceeding on that basis. There was a Model Law on Procurement of Goods and Construction, which had already been adopted by the Commission, and the task now was not to revise that law but, as determined by the Working Group, to expand it to include rules on the procurement of services. Accordingly the changes from the original Model Law had been marked, so that, in considering each provision, the aim was not to improve the drafting but to see whether the Commission considered the changes acceptable or whether they should be amended or added to given the special nature of the procurement of services. The new text was not to be a second model law, but an alternative for those wishing to include the three categories of procurement.

43. Mr. CHATURVEDI (India) welcomed the clarification by the Commission Secretary, which was useful as a general guide, and agreed that what had already been adopted should be followed as far as possible. Nevertheless the inclusion of services in the Model Law was already tantamount to an amendment, and those who wished to express their views should not be prevented from doing so.

44. Mr. CHOUKRI SBAI (Morocco) said that the text of paragraph 1 (b) (v) of article 6 was unclear, since it seemed to cover the directors or officers of suppliers, inasmuch as they should not have been convicted of certain offences, and he requested clarification.

45. Mr. HUNJA (International Trade Law Branch) emphasized the importance of the provision, particularly from the viewpoint of the integrity of the procurement process. The intention was, of course, to cover all those involved in the supply of goods and construction and now of services, and establish that they must not have been involved in any offence. He wondered whether the representative of Morocco thought that, in terms of the procurement of services, there was some omission in referring to directors or officers.

46. Mr. KLEIN (Inter-American Development Bank), referring to paragraph 6 (c), said that the provision was badly drafted, since the important point was not the nature of the error but that it should be made good.

47. Mr. CHATURVEDI (India) said that in the English text of paragraph 1 (b) (v) the word "disbarment" was wrongly used; he wondered whether "debarment" should be used instead.

48. The CHAIRMAN said that there were no errors in the Spanish version. He therefore took it that the Commission wished to adopt article 6 as a whole.

49. It was so decided.

Article 7

50. Mr. LEVY (Canada) said that in article 7, paragraph 1, reference should be made to chapter IV bis.

51. The CHAIRMAN said that that point could be settled when the text as a whole was adopted. In the meantime, paragraphs 1 and 2 of that article would be adopted.

52. Mr. LEVY (Canada) said that there was a duplication between the provisions of paragraph 3 (a) (ii) and article 41 ter.

53. Ms. SABO (Canada) said that the French version of paragraph 3 (b) (ii) should read article 41 ter instead of article 39 ter.

54. The CHAIRMAN said that in view of the difficulties arising from references in one provision to another, that issue could be clarified following a careful study by the Drafting Group of the provisions involved, especially the cross references.

55. Mr. CHATURVEDI (India) suggested that paragraph 3 (b) (ii) should be deleted so that the text would remain as originally drafted.

56. Mr. JAMES (United Kingdom) said that, in his opinion, the confusion was caused by the fact that article 23 dealt with the contents of invitation to tender and invitation to prequalify while article 41 concerned soliciting a proposal or price quotation. The issue should be referred to the Drafting Group.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

57. Mr. LEVY (Canada) suggested that the Drafting Group should consider whether paragraph 3 (b) (ii) was compatible with the rest of the Draft Model Law.

58. The CHAIRMAN said that if he heard no objections, he would take it that the Commission endorsed the suggestion.

59. It was so decided.

60. Mr. SHIZHAOYU (China) said that as paragraph 3 (a) (v) was in contradiction with paragraph 3 (a) (iii) some amendments were in order.

61. The CHAIRMAN said that paragraph 3 (a) (v) reflected the text that the General Assembly had recommended to Member States and that it had already been adopted.

62. Mr. HUNJA (International Trade Law Branch) said that paragraph 3 (a) (v) concerned "any other requirements" not provided for in paragraphs 3 (a) (i) to 3 (a) (iv) and had to do with prequalification. Those requirements had to be compatible with the provisions of paragraph 3 (a) (iii).

63. Mr. CHATURVEDI (India) said that although he did not believe that paragraphs 3 (a) (iii) and 3 (a) (v) were incompatible, the latter could be deleted.

64. The CHAIRMAN said that deleting paragraph 3 (a) (v) would limit the options available to the procuring entity; the paragraph should therefore be retained.

65. Mr. CHATURVEDI (India) said that deleting paragraph 3 (a) (v) would not limit options available to the procuring entity.

66. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 7 with the exception of paragraph 3 (b) (ii).

67. It was so decided.

Articles 8, 9 and 10

68. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt articles 8, 9 and 10.

69. It was so decided.

Article 11, paragraph 1

70. Mr. WALLACE (United States of America) said that article 41 bis paragraphs 3 (a), (b) and (c) provided for three very broad exceptions. In that connection, it might be useful to have the record-keeping requirement provided for under article 11, paragraph 1 apply to such cases also. Therefore, it would be appropriate to wait until article 41 bis had been considered before taking any decision on article 11, paragraph 1.

71. Ms. SABO (Canada) said that the reference made in the French version of paragraph 1 (i) bis, to article 41, paragraph 1 (b) did not appear to correspond to the English version.

72. Mr. TUVAYANOND (Thailand) sought clarifications concerning the inclusion of the underlined text in paragraph 1 (d).

73. Mr. JAMES (United Kingdom), replying to the delegation of Thailand, said that when a consultant was hired on an hourly basis, there was no knowing beforehand how many hours he was going to work. Therefore, paragraph 1 (d) made reference to "the basis for determining the price" which would make it possible to calculate, for example, the cost of each hour of work performed by the consultant. That was related in particular to the procurement of services as were the words "if these are known to the procuring entity" at the end of paragraph 1 (d) since the procurement proceedings could begin before the processing of the documents ended.

74. Mr. TUVAYANOND (Thailand) said that he still did not understand why the words "if these are known to the procuring entity" had been included. Since the basis for determining the price needed to be known, those words were superfluous.

75. Mr. WALLACE (United States of America) said that the problem stemmed partly from the fact that the procuring entity had to prepare, in accordance with paragraph (1) (e), a summary of the evaluation and comparison of tenders, proposals, offers or quotations and must be in a position to include in the summary at least the price, of the offer it had accepted. In the case of tendering proceedings, the price was known after all the tenders had been opened and that was why paragraph (1) (d) had been included so that there would be no problems later on; however, concerning services, if the fourth method were used, whereby tenders were placed in a certain order, theoretically some of them might never be opened. That was why paragraph (1) (e) had been included. The United Kingdom delegation had already explained the reasons for the inclusion of paragraph (1) (d).

76. Mr. CHATURVEDI (India) said that, in his delegation's opinion, the inclusion of paragraph (1) (e) made it unnecessary to include the underlined words in paragraph (1) (d). Therefore, paragraph (1) (e) as currently drafted, should be retained and the words underlined in paragraph (1) (d) should be deleted.

77. Requiring the procuring entity to investigate for instance the basis for determining prices in foreign countries would be asking it to do too much. It should be enough to mention the price and the principal terms and conditions of each tender. Therefore, the words underlined in paragraph (1) (d) should be deleted.

78. The CHAIRMAN said that in his view, retaining the underlined text would give the procuring entity more flexibility since the price might not be known at the time the proceedings were initiated.

79. Mr. HUNJA (International Trade Law Branch) said that the words underlined gave greater flexibility to the procuring entity and reflected what happened in practice in the procurement of services, since most bidders did not set fixed prices but rather provided a formula by which a price could be calculated. For that reason alone, it was important for the procuring entity to have the authority to include in the record the basis for determining the price and not an exact figure.

80. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 11, paragraph 1, as a whole.

81. It was so decided.

Article 11, paragraphs 2 to 4

82. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt the text of article 11, paragraphs 2 to 4, without any amendments in view of the fact that they reflected the UNCITRAL Model Law that had been adopted in 1993.

83. It was so decided.

Article 11 bis

84. Mr. CHATURVEDI (India) said that he would appreciate an explanation as to why the underlined words had been included. In his delegation's opinion, offers, proposals or quotations could not always be rejected as happened in the case of tendering. Therefore, the inclusion of those words would have to be justified.

85. Mr. HUNJA (International Trade Law Branch) said that offers, proposals or quotations could indeed also be rejected by the procurement entity under certain conditions, as provided for by article 11 bis, which was based on article 33 of the original Model Law. In the original Model Law, article 33 had been put under Chapter III, which concerned only tendering. However, when the Working Group had considered the topic of services, it had decided that that regulation was also applicable to offers, proposals or quotations; accordingly, while the

(Mr. Hunja)

substance of the article had not changed, because it was included under Chapter I on general provisions, those words had had to be underlined.

86. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 11 bis, paragraphs 1, 2 and 3.

87. It was so decided.

Article 11 ter

88. The CHAIRMAN said that as indicated in the footnote, article 11 ter was a new text and therefore did not contain any underlined words. The Working Group had decided that it would be advisable to include it because it dealt with the culmination of the procurement proceedings and the entry into force of the procurement contract awarded.

89. Mr. CHATURVEDI (India) said that while his delegation considered the wording of article 11 ter appropriate, it would nevertheless like to suggest a minor amendment, namely, the addition of the words "or accepted" at the end of paragraph 2.

90. Mr. TUVAYANOND (Thailand), supported by Mr. Levy (Canada), said that, since potential suppliers or contractors needed to know it beforehand, the date of entry into force of the contract should be notified at the time that offers, proposals and quotations were requested.

91. Mr. CHATURVEDI (India) said that his delegation believed that the date of entry into force of contracts must be notified at the time that offers, proposals or quotations were accepted.

92. The CHAIRMAN said that since none of the other members of the Commission seemed to support the Indian delegation's proposal, he would take it that the Commission wished to adopt article 11 ter as currently drafted.

93. It was so decided.

Article 12

94. Mr. WALLACE (United States of America) highlighted the innovative nature of article 12 which required that notice of all procurement contract awards, including cases of single-source procurement, be published. The purpose of the draft article was to protect citizens from possible abuses and to promote transparency. Thus, it might be advisable to make the point more clearly in the corresponding commentary, indicating that the notice would be published even in cases of single-source procurement contracts so that contractors would know that such proceedings were under way. It was an established practice in some States, and should be extended to the others. The explanation that his delegation proposed to include in the commentary would draw the attention of all Stats to that practice so that others could adopt it if they saw fit.

95. The CHAIRMAN said that the preamble to the Draft Model Law clearly indicated that its purpose was to promote competition. What was at stake was the protection of consumers and taxpayers; the United States delegation's proposal was therefore pertinent.

96. Mr. CHATURVEDI (India) said that he failed to grasp the significance of article 12, paragraph 1, and suggested that it should be formulated more clearly. In any case, he doubted whether the article could be applied in practice in major countries given the enormous number of notices that would have to be published.

97. The CHAIRMAN said that the meaning of the paragraph under consideration was clear. Obviously, the publication of such notices could be a costly matter but that was the price that citizens must pay, through taxes, in order to safeguard the international nature of tendering, which was the intended purpose. In any case, article 12, paragraph 3, authorized the State to specify that paragraph 1 was not applicable to awards where the contract price involved was less than a specified amount. In other words, the States could ease the difficulty indicated by the Indian delegation.

98. Mr. LEVY (Canada) said that in many States, notices of contract awards were routinely published in the official gazette. Article 12 merely reflected that practice, and was fully satisfactory.

99. Mr. TUVAYANOND (Thailand) proposed that the words "less than" in paragraph 3 should be replaced by the words "of a small amount" in order to avoid having to constantly be changing the price that would be indicated in the national legislation pursuant to the provision, in the event of inflation.

The meeting rose at 6.05 p.m.

UNITED
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General Assembly

Distr.
GENERAL

A/CN.9/SR.522
1 June 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 522nd MEETING

Held at Headquarters, New York,
on Wednesday, 1 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

CONTENTS

New international economic order: procurement (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Article 12 (continued)

1. The CHAIRMAN invited the Commission to resume its discussion of article 12 of the draft Model Law on Procurement of Goods, Construction and Services.

2. Mr. TUVAYANOND (Thailand) suggested that rather than specifying a price, in article 12, paragraph 3, it might be preferable to say "where the contract price is of a minor amount".

3. Mr. WALLACE (United States of America) agreed, adding that the threshold for services might be different from that for construction or goods. Rather than changing the Model Law, it might be better to state in the commentary that legislators in their individual countries could adapt national regulations.

4. Mr. JAMES (United Kingdom) agreed with the representative of the United States of America that the commentary should specify that each State should enact its own regulations, and that the specific amount might vary, depending on whether the contract involved goods, construction or services. Article 12 was intended to protect the rights of suppliers and contractors, and also those of taxpayers by informing them of the procurements that had occurred and awards which had been made. It was important for the procuring entity to know which awards it was required to publish.

5. Mr. GRIFFITH (Observer for Australia) and Mr. KLEIN (Observer for the Inter-American Development Bank) supported the proposals of the previous speakers.

6. Article 12, as amended, was approved.

Article 13

7. Mr. HUNJA (International Trade Law Branch), responding to a question from Mr. CHATURVEDI (India), said that the point of referring, in line 4, to "any current or former officer or employee" was to try to close as many loopholes as possible. A member of the board of directors of a company, for example, was not, strictly speaking, an employee, hence the need to use both terms.

8. Article 13 was approved.

Article 14

9. Mr. CHATURVEDI (India) said that the expression "that create obstacles to participation" in article 14, paragraph 1, was vague and that the phrase "including obstacles based on nationality" was inappropriate since nationality was a valid criterion for selection in many countries. Furthermore, the inclusion of the words "or services" in the second sentence of paragraph 2 was inappropriate.

10. The CHAIRMAN said that, while it was true that in some countries local contractors were given advantages, the general principle stated in article 14, paragraph 1, concurred with the preference for international procurement outlined in the preamble.

11. Mr. AL-NASSER (Saudi Arabia) said that since the article dealt primarily with goods, there was no reason to include the word "services".

12. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that the reference to services should be included in article 14 and that trademarks could also be used with reference to various services. The field of services was expanding exponentially and the article would certainly have application in the future.

13. Mr. CHOUKRI SBAI (Morocco) said that the issue of services did come up in areas ranging from transport to computers and that it was a concept that was continually evolving. Therefore, he agreed that the reference to services should be retained in article 14.

14. Article 14 was approved.

Article 15

15. The CHAIRMAN suggested that article 15 be approved as it stood.

16. Article 15 was approved.

17. Mr. WALLACE (United States of America) said that, although his delegation had earlier been critical of article 16, it was now convinced that there was no alternative to the current text. Even the extreme measure of providing for the procurement of goods and services under separate heads would cause other objections to be raised. He wished, nevertheless, to suggest a few drafting changes. In article 16, paragraph 2, a description of the method in question should be included in parentheses after each of the articles mentioned and, in article 16, paragraph 3, the term "procedures" should be replaced by "methods".

18. Mr. LEVY (Canada) said that after careful consideration of article 16, his delegation had concluded that in order for the model law to be acceptable to a broad spectrum of States, all the methods listed as options must be retained. The procurement methods listed were merely options and States were free to modify them.

19. With regard to the structure of the article, he was convinced that, short of drafting separate provisions on services, any attempt to restructure the article would create a new set of problems. The Commission should therefore leave well enough alone.

20. Ms. SABO (Canada) said that she could not support the suggestion made by the representative of the United States of America that the term "procedures" should be replaced by "methods". The original Model Law made a distinction between "methods" and "procedures", and the substitution of "methods" for "procedures" would give rise to unnecessary confusion.

21. Mr. WALSER (Observer for the International Bank for Reconstruction and Development) said that he agreed with the views which the representative of the International Bar Association had expressed on article 16 during the meeting of the Working Group held in March 1994. Services throughout the world were generally procured either through tendering procedures or through requests for proposals. Paragraph 3 (b) should therefore be deleted.

22. Mr. CHOUKRI SBAI (Morocco) drew attention to a number of discrepancies between the Arabic and other language versions of the draft Model Law. The French version, for example, contained a reference to "records" which was translated in the Arabic version by a term which meant "register". He would particularly welcome clarification of the term "goods" as used in the draft Model Law. It was important to know whether the term was used as a general concept referring to real or intellectual rights or whether it referred to movable or immovable goods.

23. Mr. CHATURVEDI (India) said that his delegation was in favour of article 16 as currently drafted and did not agree that paragraph 3 (b) should be deleted.

24. Mr. JAMES (United Kingdom) said that after careful examination his delegation had concluded that article 16 as currently drafted represented the best available solution. He did not agree that paragraph 3 (b) should be deleted. It must be borne in mind that enacting States would rely on the Model Law to govern all procurement, the Model Law should therefore make all methods of procurement available to the procuring authority. The sophisticated methods of procurement proposed in Chapter IV bis would be desirable only if the procuring entities had the necessary time and money to devote to the complicated procedures which they entailed. It must also be remembered that routine services were increasingly being contracted out, much of it by tendering or by competitive negotiation.

25. As to which was the better term to use in paragraph 3, whether "methods" or "procedures", he pointed out that Chapter IV bis described not methods but a method of procurement which had a subset of different procedures. A possible compromise would be to use the term "method" in the singular instead of "procedures".

26. Mr. WESTPHAL (Germany) pointed out that paragraph 1 described tendering as the normal method of procurement, while paragraph 3 appeared to suggest that tendering should be used only if there was good reason to do so.

27. Mr. TUVAYANOND (Thailand) said that he supported the use of the term "method" instead of "procedures" in paragraph 3, and the retention of paragraph 3 (b).

28. On the subject of the Commission's method of work, members should be allowed to express their views on any subject, even if the particular subject had been considered by a working group. It must be borne in mind that not all members were represented on working groups.

29. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he supported the position adopted by the representative of the World Bank. It was his impression that the Commission did not have the expertise to adequately deal with all the complexities of the Model Law as it related to services and had therefore sought to ensure that all methods of procurement of goods would automatically be available for services. However, he cautioned that, since many of the methods were unstructured it would be necessary to provide detailed guidelines on how they should be applied.

30. Mr. SHI Zha (China) said that, while the current version of article 16 represented an improvement over the previous text, there was still room for improvement. Paragraphs 3 (a) and (b) did not clearly identify specific methods of procurement of services. The draft text should first identify the methods before describing the procedures governing their use.

31. Mr. MELAIN (France) said that his delegation supported article 16 as currently drafted although it should be read in conjunction with chapter IV bis. He however agreed with the United Kingdom delegation that notwithstanding chapter IV bis, other methods of procurement could be used, particularly when handling the procurement of a small volume of services. Concerning paragraph 3 in the French version of the text, he pointed out that the reference to article 39 bis was no longer correct, since that article had become chapter IV bis.

32. Mr. LOBSIGER (Observer for Switzerland) said that article 16 was sound in that it made a distinction between goods and construction on the one hand and services on the other while respecting the pre-existing structure of the Model Law as approved by the Commission with respect to methods of procurement of goods and construction. That key provision had made it possible to limit the primary methods of procurement of services to one area. The task of reducing the number of methods could be left to national lawmakers. Such a task could be better accomplished if some additional information were provided in a commentary which would reflect the doubts of certain delegations regarding certain secondary methods of procurement and their applicability to the procurement of services.

33. Ms. SABO (Canada) said that the question of whether or not to use "method" and "procedures" could be addressed by the drafting group. Concerning the comment made by the representative of Germany, she noted that unless new methods were given a certain amount of prominence, there was a very real risk that inexperienced procurement entities might not get the best results from tendering. Therefore, article 16 should not be amended. It could be indicated in a general comment that the Working Group's work had been accomplished in the presence of representatives with great expertise in the field of procurement and that even where delegates did not particularly have the expertise they had consulted with experts in their States.

34. Mr. UEMURA (Japan) said that his delegation wished to know whether requests for proposals procedures under the Model Law fell within the meaning of tendering procedures in the General Agreement on Tariffs and Trade (GATT) Agreement.

35. The CHAIRMAN suggested that article 16 should be accepted as currently drafted, and that the suggestions put forward by the observers for the Inter-American Development Bank and the World Bank could be included in the commentary. The latter could even indicate that some States might wish to delete paragraph 3 (b) when they incorporated the Model Law into their own legislation. He agreed with the representative of Germany that it might be better to reverse the order of paragraphs 3 and 2. In response to the concern voiced by the representative of Japan, he noted that while the Model Law did not follow GATT terminology, it did reflect the spirit of the GATT Agreement.

The meeting was suspended from 11.48 a.m. to 12.22 p.m.

36. Mr. HUNJA (International Trade Law Branch), replying to a question from Mr. TUVAYANONI (Thailand), said that in the original Model Law, the first part of article 16, paragraph 2, established the right of the procuring entity to use any of the methods pursuant to articles 17, 18, 19 and 20 and the second part established the obligation to keep a record of the reasons why those methods were used. In the text before the Commission, the two issues were dealt with in separate paragraphs, paragraphs (2) and (4) respectively; the linking phrase "and, if it does" had therefore been deleted.

37. Mr. LEVY (Canada), referring to article 16, paragraph 4, said that the words "relied to justify" might cause problems in interpretation. Where something was not reviewable it seemed unfortunate to require justification, since no matter how inadequate any justification might be there was nothing that a contractor could do. The same problem arose in article 41 sexies, paragraph 1 (b).

38. Mr. WALLACE (United States of America) said that the wording had been chosen quite deliberately in both instances and must stay, since it was a very important part of the Law.

39. Mr. JAMES (United Kingdom) said that he agreed with the representative of the United States. The wording of article 16 reflected a compromise between those who wanted the choice of method to be subject to review and those who felt that it should not be justiciable since it related to an administrative choice, positions which had been reconciled by agreeing that it should be in the public domain. His delegation would be most uneasy should any effort be made to upset that balance. The drafting of article 16, paragraph 4, was, perhaps, ambiguous since it could be interpreted as imposing, in relation to services, a requirement to give reasons where the preferred method of requests for proposals for services was employed, which would be inconsistent with practice under the existing Model Law, and was surely not the intent. The wording of that paragraph should be reviewed.

40. Mr. WALSER (Observer for the World Bank) said that article 16, paragraph 4, simply meant that where a procuring entity used a method other than the normal method it should justify or explain its choice. It might have been preferable to have had a paragraph 3 stating that the normal practice was to use chapter IV bis, a paragraph 4 indicating exceptions in the case of services, and a paragraph 5 referring back to paragraph 4 with respect to services and to paragraph 2 in respect of goods and construction. Such drafting would be much clearer.

41. Mr. KLEIN (Observer for the Inter-American Development Bank), noted that in many States the rule enshrined in article 11 bis that a procuring entity need not justify its rejection of tenders was qualified by a requirement for justification once envelopes had been opened. That qualification was intended to prevent a procuring entity from rejecting all tenders if a preferred contractor had not won.

42. The CHAIRMAN said that he took it that the Commission wished to approve article 16.

43. It was so decided.

The meeting rose at 1.05 p.m.

UNITED
NATIONS

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General Assembly

Distr.
GENERAL

A/CN.9/SR.523
18 October 1994
ENGLISH
ORIGINAL: SPANISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 523rd MEETING

Held at Headquarters, New York,
on Wednesday, 1 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

(b) PROCUREMENT OF SERVICES (continued)

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The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

(b) PROCUREMENT OF SERVICES (continued)

Article 16

1. Mr. JAMES (United Kingdom) said that he had no objection to the proposal formulated by the United States delegation. Nevertheless it was his delegation's understanding that paragraph 2 of article 16 of the UNCITRAL Model Law on Procurement of Goods and Construction authorized the procuring entity to use a method of procurement other than tendering proceedings only pursuant to articles 17, 18, 19 or 20, and only if the conditions set forth in those articles were met.

2. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the substance of article 16 and submit it to the Drafting Group for consideration of the United States proposal.

3. It was so decided.

Articles 17 and 18

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve articles 17 and 18.

5. It was so decided.

Article 19

6. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to approve the substance of article 19 and submit it to the Drafting Group to consider the possibility of avoiding the repetition of the word "provided" in the English text and the replacement of the word "prestados" in the Spanish text by a more appropriate expression.

7. It was so decided.

Article 20

8. Mr. WALLACE (United States of America) said that he agreed with the text of article 20. He recalled that paragraph 1 (d) of the article, which authorized the procuring entity to contract with a single supplier for reasons of standardization, had been debated at great length in the Working Group. While such treatment had not caused particular difficulty in the procurement of goods, its application was much more complicated when the object of procurement was a service. For example, it could give rise to ethical problems. Accordingly, his delegation reserved the right to propose, when the commentary to the paragraph was considered, that reference should be made to the appropriateness of regulation of the matter by States under article 4.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 20.

10. It was so decided.

Articles 21 to 35

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to approve articles 21 to 35.

12. It was so decided.

Chapter IV

13. Mr. WALLACE (United States of America) said that it might be appropriate to amend slightly the title of chapter IV, "Procedures for procurement methods other than tendering", since the draft now included a chapter IV bis which also dealt with a procurement method other than tendering.

14. Mr. LEVY (Canada) proposed that the title should be amended to read: "Other common procurement methods".

15. The CHAIRMAN suggested that the possibility should also be considered of using the expression "alternative methods", suggested by Mr. Herrmann.

16. Mr. LEVY (Canada) endorsed Mr. Herrmann's suggestion.

17. Mr. CHOUKRI SBAI (Morocco) suggested that the title of chapter IV should be "Two-stage procurement procedures".

18. Mr. TUVAYANOND (Thailand) said that he doubted whether it was appropriate to amend the title of the chapter, which was identical to the text of the Model Law already adopted, except to the extent that it was justified by the special nature of services. To do otherwise might suggest that the subject required special treatment.

19. The CHAIRMAN agreed that, before introducing changes, every effort should be made to establish reasons for them.

Articles 37 to 41

20. The CHAIRMAN, referring to articles 37 to 41, said that the amendments to the text reflected the ideas expressed at the meetings of the Working Group, while elsewhere the text retained the original drafting of the Model Law already adopted. Accordingly, if he heard no objection, he would take it that the Commission wished to approve the articles.

21. It was so decided.

Chapter IV bis

22. The CHAIRMAN invited the Commission to consider chapter IV bis, which was completely new. It would probably be necessary to begin with the matter of the title, which, at least in the Spanish version, was the same as that of article 41 bis.

23. Mr. WALLACE (United States of America) said that he had no objection to the title of the chapter, but thought it might be moved to become chapter III bis, since chapter III dealt with tendering proceedings, which were the principal procurement method for goods and construction, while chapter IV bis dealt with services.

24. Mr. SHI Zhaoyu (China) said that chapter IV bis dealt with requests for proposals. In the English text, chapter III used the word "proceedings", while chapter IV spoke of "procedures"; the Chinese text, on the other hand, used the same term for both. Further, chapter IV bis referred to "procedures" or methods, and thus was consistent with chapter IV. For the content of chapter IV bis to be consistent with that of chapters III and IV, he proposed that the title of chapter IV bis should be amended to read "Methods for the solicitation of proposals for services".

25. Mr. TUVAYANOND (Thailand) asked for clarification as to why, in the English text, two different expressions were used, one for the title of the chapter ("Requests for proposals") and the other for the title of article 41 bis ("Solicitation of proposals"). The reason for the difference was not clear.

26. Mr. WESTPHAL (Germany) noted that paragraph 54 of the report of the Working Group stated: "In particular, request for proposals and competitive negotiations dealt with cases in which the procuring entity did not know the nature of the technical solution to its needs", whereas article 39 dealt with cases where the procuring entity attributed particular importance to the quality of the services supplied. He wondered whether the expression "request for proposals" should be used, since, as he had just noted, it was reserved for a specific situation. In document A/CN.9/392, in connection with article 39 bis, three titles were proposed, one of which, "Special procedure for procurement of services", could perhaps be used to resolve the problem.

27. Mr. LEVY (Canada) said that his delegation also had some doubts concerning the title of chapter IV bis, since the expression "Request for proposals", used for article 38, should not be repeated. Since, when drafting legal texts, titles were usually left to the end, he suggested that the matter could be taken up again once consideration of the chapter was concluded. As for moving the title, he recalled that the structure of the Model Law had been the subject of extensive debate to ensure that the text ultimately adopted would be more coherent, but he agreed that it could be placed following the chapter on tendering proceedings, which would then be followed by other common or alternative methods.

28. Mr. WALLACE (United States of America) said that the title of the chapter involved a substantive issue to which he would not refer since the representative of Germany had already done so. In his view, the problem resided

partially in the fact that article 38 was entitled "Request for proposals". In his country and at the World Bank, so far as he knew, it was customary to refer to "RFP", or requests for proposals, the term which was normally used to designate that method of selecting services. That was what had led to the compromise solution of referring to a request for proposals for services. In order to solve the problem of the chapter title, he suggested that the title of article 41 bis should be changed to "Notice", which was the procedure that preceded a request for proposals, or RFP.

29. Mr. CHATURVEDI (India) agreed with the representative of China that the title of chapter IV bis was unclear. Apparently, the chapter dealt with special provisions on procurement of services. Thus, if the title was to be changed, as he believed it should be, it should read "Methods of procurement of services". He did not agree that the word "notice" should be used, as it would be unclear what type of notice was involved. With reference to paragraph 1 of article 41 bis, which stated that "A procuring entity shall solicit proposals for services", he said that the paragraph dealt with a method of procuring services, and that it was not always necessary to solicit proposals. He did not believe that that was the implication. Moreover, there was no mention of either the suitability or the qualifications of the person or entity that was to provide the services; that should be included in article 41 bis.

30. Mr. JAMES (United Kingdom) said that he shared the views expressed by most of the previous speakers. It would be useful to relocate the chapter and, at the same time, to adopt the suggestion made by the Secretary of the Commission that reference should be made to "alternative methods", as that would make the ensuing provisions clearer. In addition, while he agreed that the title of the chapter should be changed, he did not believe that the Commission should devote too much time to the matter, especially if the Working Group had already discussed it extensively. In his view, the title of article 41 bis led to confusion, and the question should be considered by the Drafting Group. The intention was basically to reflect the sequence of events in the procurement process, which consisted of a notice seeking expression of interest in submitting a proposal, followed by the forwarding of the relevant documents. The idea was that article 41 bis should deal with the notice procedure; the solicitation of proposals was what was sent in response to expressions of interest. He did not agree that the article should simply be entitled "Notice", although that term could be incorporated into the title.

31. Mr. WALSER (Observer for the World Bank) raised an issue concerning the structure of the chapter. While he could accept the need for the other procurement methods referred to in article 16, paragraph 3 (b), namely, two-stage tendering, request for proposals and competitive negotiation, he failed to understand why it was necessary to have two categories of requests for proposals for services, namely, the simple type referred to in article 38, which applied to goods as well as construction and services, and the more complex but, in his view, incorrect type outlined in chapter IV bis. He would appreciate an explanation in that regard. The two categories complicated the situation for the procuring entity, which must, in the final analysis, decide which type applied to services. In his view, the content of article 16, paragraph 3 (b) notwithstanding, the category of requests for proposals envisaged in article 38 was unnecessary and should be eliminated.

32. Mr. LEVY (Canada) said that the Drafting Group should take into account the pertinent suggestion made by the Secretary of the Commission that reference should be made to "alternative procurement methods". The problem could perhaps be solved by using the expression "principal methods of procurement of services" and providing for alternative methods applicable to goods, construction and services. Article 41 bis could be entitled "Announcement of solicitation of proposals", although that appeared to be somewhat redundant. In reply to the statement made by the Observer for the World Bank, he said that his Government was opposed to any attempt to delete article 38, which would apply to cases in which one did not know with certainty what was required, while article 41 bis would be reserved for those cases in which one knew precisely what was required.

33. Mr. WALLACE (United States of America) said that the idea of relocating chapter IV bis was interesting, as was the Canadian suggestion that reference should be made to the "principal" or "preferable" method; the suggestion made by the Secretary of the Commission that the other methods should be termed "alternative" would then be not only logical and appropriate, but also be in keeping with the tenor of the Guide. With regard to the title of article 41 bis, he believed that it dealt specifically with the concept of notice; the very word was included in the provision.

34. Mr. TUVAYANOND (Thailand) supported the Canadian proposal to change the title of chapter IV bis to "Notice of request for proposals for services".

35. Mr. LEVY (Canada) said that, in the English version of paragraph 1 of article 41 bis, the word "expression" should be replaced by "expressions".

36. Mr. HUNJA (International Trade Law Branch) said that one of the selection procedures listed in article 41 sexies was similar to the method provided for in article 38. Moreover, under the condition envisaged in article 17, paragraph 1 (a), where it was not feasible for the procuring entity to identify the characteristics of services, article 38 would presumably apply. It should be noted that the methods provided for in article 38 and in chapter IV bis overlapped to some extent.

37. The CHAIRMAN said that, as the Canadian delegation had noted, the procedure in article 17 would apply in cases where there were no details on the items to be procured; in cases where some information was available, the procedure in article 41 bis would apply.

38. Mr. WALLACE (United States of America) said that there was no way to know with certainty under what circumstances articles 38, 39 or article 41 bis would apply. Therefore, the article that was most appropriate, based on the various procedures provided for in each article, should be applied. Thus, article 41 bis established the requirement of a notice which did not appear in either article 38 or article 39. In contrast to articles 38 and 39, article 41 ter contained a detailed list of the information to be included in requests for proposals. In addition, the criteria listed in article 41 quater were very different from those listed in article 38.

39. His delegation would bow to the wishes of the Working Group and would, therefore, accept the 11 methods proposed, even though 5 of them could be

eliminated in the case of services, namely, two-stage tendering, the Canadian method, competitive negotiation, restricted tendering and request for quotations.

40. Mr. CHATURVEDI (India) said that the Canadian proposal concerning the title of chapter IV bis appeared to be correct. The first line of paragraph 1 of article 41 bis should read "A procuring entity shall solicit requests for proposals for services". Paragraph 1 should also mention the award of contracts, as well as experience.

41. Mr. SHI Zhaoyu (China) said that it did not seem appropriate to use the word "notice" in the title of chapter IV bis, since the chapter referred to many other questions. Chapter IV bis referred to procedure and should include special methods for services.

42. Mr. CHATURVEDI (India) asked whether the Commission was to conclude its work before the Drafting Group met.

43. Mr. HERRMANN (Secretary of the Commission) said that the Drafting Group met during the UNCITRAL session. The Group consisted of six teams of linguists who were responsible for preparing the various language versions in the six official languages of the Organization. Each language team consisted of a reviser from the United Nations translation services and a delegate attending the UNCITRAL session who, as a member of the team, represented a language rather than a Government. The Group was concerned solely with drafting questions; if it observed that a drafting change could have substantive consequences, it brought the matter to the attention of the Commission for resolution. Thus, with the help of the Drafting Group, UNCITRAL could examine the results of its work and adopt a final text at the close of its session.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

44. Mr. JAMES (United Kingdom) praised the representative of the United States of America for his eloquent defence of the provisions under discussion, and especially for chapter IV bis. That delegation should nevertheless make an effort to understand the issues raised by Mr. Hunja, which were of concern to several delegations.

45. The United States delegation had proposed the elimination of articles 38 and 39 so that the Commission might concentrate on chapter IV bis. In the view of the United Kingdom, however, it would be preferable to retain chapter IV bis and concentrate on articles 38 and 39 as well as on the criteria for their application. Although he did not wish to propose that solution, so as not to break the agreement that had been reached in the Working Group, he did wish to state the reasons that the Working Group had formulated those two opposing viewpoints. As Mr. Hunja had pointed out, the real problem presented by that text was the criteria on the basis of which the articles would be applied, which was related to article 16, which had been discussed at the previous session, and to the issues raised by articles 38 and 39 and chapter IV bis.

46. That question had been debated at length in the Working Group, which had considered, with respect to the Model Law, that the Group could not draft an

appropriate formula by which to impose on the procuring entity the obligation to use any one procedure, but could only indicate its preference for the more detailed procedure because it offered both greater transparency and greater protection. Those principles had been established in the preamble. The United Kingdom was prepared to accept the compromise reached in the Working Group.

47. The problem was not a legal one, but rather of how to persuade States of the advantages of the provisions contained in the Model Law. It was a matter of explaining to States that, although there existed a great variety of methods of procurement, a principle must obtain that would favour transparency and openness in procurement. That should be clearly stated in the commentary and in the report.

48. Since some circumstances called for prompt action, it was advisable to follow a less demanding procedure. In such cases, the Model Law afforded the enacting State the possibility of allowing the procuring entity to use any option that might be appropriate for the individual case. It was up to the enacting State to determine to what extent the procuring entity would assume responsibility, and it should be mentioned that both the Model Law and the Guide to Enactment of UNCITRAL Model Law contained many safeguards against adoption by the enacting State of unsatisfactory procedures. Those safeguards ensured that the procedures would have the greatest possible transparency and openness. All those factors should be clearly explained to enacting States, and particularly in the Guide.

49. Mr. HERRMANN (Secretary of the Commission) said that he was greatly concerned by what had occurred in the Working Group, namely, the discrepancy between the text to be approved (the Model Law) and the content of the Guide. That problem was related to the problem of "selling" the text, or, in other words, of explaining it. If there was a marked discrepancy between the text of the Law and that of the Guide, and it was a matter of convincing States that the Law would function just as well in either case, and the Guide stated the contrary, that contradiction did not encourage acceptance of the text.

50. In that connection, reference was often made to the multiplicity of options; when the actual wording of the Law was examined, however, there was not a single reference to the options of legislators: only the options open to the procuring entities were mentioned. And yet in the Working Group reference had often been made to the options that Governments should enjoy, since all States would not, of course, adopt the Model Law in its entirety. In one of the provisions of the previous drafts, the options of legislators were explicitly stated. He suggested, therefore, that if such options were not referred to in the text of the Law itself, they should at least be mentioned in a footnote, a method used in other cases of lesser importance. What must be ruled out was reference to the options only in the Guide. His suggestion reflected the hope that States would actually adopt the text as a model, and was in keeping with the idea of transparency referred to in the preamble.

51. Mr. WESTPHAL (Germany), commenting on the point raised by the United States of America, namely, that the Model Law included 11 methods of procurement while the Agreement on Procurement under the General Agreement on Tariffs and Trade (GATT) included only 3, said that the only solution on which the members of the

Working Group could agree was to establish that the legislator had a choice among the 11 methods proposed. That was not in his view, an easy process, since many countries lacked both experience and criteria in the area of procurement, and would not be in a position to choose the most appropriate method from among all those options. He doubted that UNCITRAL could set out principles in the Guide on which the legislator could base that choice, since not even the Working Group had been able to develop an acceptable approach to that problem.

52. Article 41 bis was too long and extremely detailed, and in one way or another sought to incorporate a special regime for services into the Model Law. Despite the fact that most delegations were opposed to drafting a separate text on the procurement of services, article 41 was a compilation of criteria relating to that question.

53. He reminded the Commission that the purpose of the Model Law was to help developing countries and countries with economies in transition to formulate their own competitive criteria for the procurement of services. It should not be forgotten, however, that although the United Nations, through UNCITRAL, might formulate a Model Law and recommend that States adopt it, they might prefer to adopt the GATT Agreement on Procurement, and to use other criteria as a model instead of those currently being prepared by UNCITRAL.

54. The Model Law was very complex, and had become more so as a result of the effort to incorporate the procurement of services. Germany therefore vigorously supported the proposal of the Secretary of the Commission that a footnote should be added to article 41 bis specifying that it was possible to choose among the various options offered.

55. Mr. LEVY (Canada) supported the suggestion made by the Secretary of the Commission that footnotes should be used to indicate to legislators that they could choose among the various options, and that they were not bound to adopt all of them. He also fully supported the statements of the United States of America and the United Kingdom with regard to the significance of the Model Law and the problems it raised at the current stage. Article 41 bis was unnecessary; the method envisaged in article 38 was relatively transparent and avoided the bureaucratic traps in article 41 bis. It had nevertheless been argued in the Working Group that procedures should be established that would approximate in so far as possible the tendering procedures. By way of a compromise, several delegations had requested that other methods should be included as well, and that the preferred method for the procurement of services should be indicated.

56. With regard to the concern expressed by Germany, he noted that if legislators experienced difficulties in determining the method to use, they might seek expert advice; it made no sense arbitrarily to eliminate any of the methods included in the article merely to simplify the text.

57. Mr. ABOUL ENEIN (Observer for the Regional Centre for Mercantile Arbitrage, Cairo) considered that the heading of chapter IV bis was unnecessary, and that two headings could be used instead under the original title of chapter IV, "Procedures for procurement methods other than tendering". The first would be "General procedures for procurement other than tendering" and would cover the

procurement of goods, construction and services; the second, "Special procedures for services", would cover article 41 bis and the paragraphs of that article which followed.

58. Mr. WALLACE (United States of America) conceded that the members of the Working Group had perhaps split hairs somewhat in developing an acceptable text, as the representative of Germany had suggested, but pointed out that the provisions of GATT and the Model Law were very different. GATT defined what was permissible, i.e., fair or unfair, in trade policy, but did not formulate detailed operational laws. It had not, for instance, defined services. The UNCITRAL Model Law doubtless had to be brought into line with the provisions of GATT, but it was no less true that it would be difficult to achieve the objectives of the Model Law on the basis of those rules. In any case, the suggestion by the Secretary of the Commission was quite interesting, the more so since there were already footnotes in chapter V, albeit for another purpose.

59. It also went without saying that the Guide must be brought into line with the contents of the Model Law. Although the content of the Guide might appear not to be precisely the same as that of the draft Model Law, the Working Group had never intended to deviate form its provisions.

60. With regard to the comments made by the representative of Canada, it was important to recall that the Model Law represented the first time that an attempt had been made to subject the procurement of services to public regulations in such a rigorous manner. States were entering into relatively unknown territory, which meant that in some cases they would have no alternative but to turn to experts. In fact, the World Bank and the United Nations itself sent experts to various countries to assist States on such matters. Nevertheless, the Commission had a responsibility to elaborate a Model Law that was as complete as possible. While the draft under consideration might not fulfil the requirements for order, simplicity, coherence and in-depth analysis called for in a Model Law of that type, there was no doubt that, under the circumstances, the discussions had been quite useful. Finally, it must be stressed that the Commission was not advocating the use of any particular method of procurement.

61. Mr. CHATURVEDI (India), referring to the statement by the Secretary of the Commission, said that the text must clearly indicate that States could choose among the different methods of procurement set forth in the Model Law. Certainly chapter V contained footnotes, but it remained to be seen whether the problem at hand could be solved in that way. In any case, his delegation would prefer to avoid that solution, which was far from ideal. If it had accepted such a solution on previous occasions, it was only to avoid going against the majority opinion in the Commission.

62. Mr. TUVAYANOND (Thailand) said that the text under consideration struck a satisfactory balance among the interests of the various members of the Commission. To redo what had been accomplished would be a waste of time and resources. He recognized that a number of options might exist, since circumstances were not the same in all countries. Moreover, the Commission was not empowered to impose methods of procurement on legislators. The Secretary's suggestion appeared to reflect the consensus of the Commission; it might be

possible to insert a footnote to ensure that lawmakers clearly understood that they were not obliged to employ all the methods mentioned in the Model Law, but were free to choose those which were in the best interests of their own countries.

63. Mr. WALSER (Observer for the World Bank) fully endorsed the Secretary's suggestion that the Commission should provide States with a better explanation of how to proceed in choosing one or more methods of procurement. It might be appropriate to state in the text itself that States were not obliged to adopt all the methods mentioned.

64. In recent years, the World Bank had been recommending that its member States should adopt the UNCITRAL Model Law on Procurement of Goods and Construction, since it was the only such law in existence. The Bank had also provided consulting services and financial support to assist the efforts of various countries in that area. Thanks to the Bank's efforts, Poland was preparing to submit the Model Law to its Parliament for adoption, and other countries, such as Bulgaria, Estonia, Latvia and Slovakia, were considering the possibility of doing so. Nevertheless, the Bank recommended the Model Law with some reservations. For example, it suggested that the method of competitive negotiation should not be applied, and once the draft was approved, the Bank would probably also recommend against application of article 16, paragraph 3 (b). In summary, the Bank gave general support to both the Model Law that had been adopted by the General Assembly and the draft Model Law before the Commission, and it intended to continue to promote the UNCITRAL model laws.

65. Mr. GRIFFITH (Observer for Australia) said that he did not know how to interpret the statement by the representative of the World Bank that his institution recommended the UNCITRAL Model Law on Procurement of Goods and Construction because it was the only such law in existence. He hoped that the Bank would adopt a more positive attitude in that regard.

66. As for the suggestion by the Secretary of the Commission, he wondered whether it might not be advisable for the Drafting Group to function as an informal working group in the preparation of the text and footnotes to be inserted into the present document. Consideration might also be given to the possibility of preparing a brief note to reflect the comments made by the representative of Thailand regarding article 12, paragraph 3. If those comments were included in the Guide to Enactment, they might go unnoticed, whereas that would not happen if they were included in a footnote.

67. The CHAIRMAN expressed his surprise at the last few statements. A model law was only a model for legislation, and lawmakers could either adopt it in its entirety or take from it what they deemed appropriate. If the Commission decided to use asterisks or footnotes, it would have to do so in every case where lawmakers had a choice. However, if the Commission did want to include such a notice, he felt that asterisks would not suffice; what was needed was a guide for legislators. Ideas regarding the drafting of such a guide could be submitted to the Secretariat.

68. He then turned to the question which several members had raised regarding conflicts between GATT and the Model Law. He had had an opportunity to study

the text of GATT and the directives of the European Community concerning State procurement. The methods were the same, but they had different names. It was important to note that GATT instructed States regarding the legislation to be drafted, whereas UNCITRAL offered a model, thus perfectly complementing the prescriptive nature of GATT. The question of incompatibility did not arise. The Model Law offered one possible way of doing things, and it was up to lawmakers to decide whether to accept it entirely or in part.

69. Mr. HERRMANN (Secretary of the Commission) noted that, while it was he who had suggested the use of footnotes, he had no particular preference for that method. One might say that he had mentioned it for want of a better one. The important thing was that the Model Law was by nature optional; however, while drafting it, both the Working Group and the Commission had been aware that some cases were more optional than others. The idea was that it should be a finished document which could be promulgated as written, with only technical changes. If it offered a solution that did not satisfy legislators, they could change it, as had been done, for example, with the Model Law on International Commercial Arbitration. The present Model Law set forth a number of possible methods of procurement, and no one was suggesting that a State should accept all of them. He felt that the question of whether or not to accept the various methods indicated should be raised not in a separate guide, but in the law itself. Lastly, since the content of the note was a subject that called for more substantive discussion, the matter should be settled by the Commission rather than by the Drafting Group.

70. Mr. JAMES (United Kingdom) echoed the sentiments of the Chairman and the Secretary of the Commission. The Drafting Group should not be responsible for writing substantive portions of the document, particularly if footnotes would also need to be included elsewhere in the Model Law. In the present case, the footnote was of critical importance. He was sorry if he had given the impression that he wished to reject the compromise reached by the Working Group. He had merely wished to remind the Commission that there had been another point of view. He was among those who thought that some States might wish to make use of all of the methods presented in the Model Law, but he felt it would be difficult to indicate to States in a brief note how many or which methods they should adopt. The appropriate place to do so was in the commentary, but when the question had been considered by the Commission and the suggestion had been made that each article might be followed by a commentary, that had not been considered practical. He was opposed to the idea of adding a footnote because discussion of its content would only be a waste of the Commission's time.

71. The CHAIRMAN suggested that the asterisks might refer to the pertinent paragraphs of the Guide to Enactment. Perhaps time could be set aside to provide the Secretariat with ideas for the drafting of the Guide.

The meeting rose at 6.10 p.m.